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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

POM WONDERFUL LLC, a Delaware limited liability company,

13 Plaintiff,

14

VS.

15 ROBERT G. HUBBARD d/b/a PUR
16 BEVERAGES, PORTLAND
17 BOTTLING COMPANY an Oregonian
company, and DOES 1 through 10,
inclusive.

18 Defendants.

Case No. CV13-06917 MMM CWx

**PLAINTIFF POM WONDERFUL
LLC'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
INJUNCTION**

Hon. Margaret M. Morrow

Date: March 3, 2014

Date: March 5, 2013
Time: 10:00 a.m.

Place: Courtroom 780

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1 TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on March 3, 2014, or as soon thereafter as
3 the matter may be heard, in Courtroom 708 of the United States District Court for
4 the Central District of California, 255 East Temple St., Los Angeles, CA 90012,
5 Plaintiff POM Wonderful LLC will and hereby does move this Court for a
6 preliminary injunction and order against Defendant Robert G. Hubbard d/b/a PUR
7 Beverages (“Defendant”).

8 Plaintiff will, and does, seek an order from the Court, pursuant to Rule 65 of
9 the Federal Rules of Civil Procedure, for an order preliminarily enjoining
10 Defendant, and all of its officers, directors, owners, agents, representatives, servants,
11 employees and attorneys, and all those in active concert or participation with it,
12 from infringing upon Plaintiffs’ POM® trademarks and from engaging in acts of
13 unfair competition.

14 This Motion is brought on the grounds that Plaintiff is the owner of a family
15 of POM® trademarks, including many federally registered marks, for use in
16 connection with their pomegranate products. Defendant, with full knowledge of
17 Plaintiff’s extensive and exclusive rights in the POM® trademarks is intentionally
18 and willfully infringing upon those rights by directly selling or distributing an
19 energy drink product under the name PUR pōm, which copies Plaintiff’s POM®
20 trademark and is in direct competition with Plaintiff.

21 This Motion is based upon this Notice of Motion and Motion, the
22 accompanying Memorandum of Points and Authorities, the Declarations of Jeremy
23 Adams and Michael Vasseghi, the [Proposed] Order, all the pleadings and papers on
24 file in this action, and upon such other matters as may be presented to the Court at
25 any hearing on the Motion.

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1 DATED: November 22, 2013 ROLL LAW GROUP PC

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4 By: /s/ Michael M. Vasseghi /s/
5 Michael M. Vasseghi
6 Attorneys for POM WONDERFUL LLC

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1 I. INTRODUCTION

2 In a transparent effort to cash in on the reputation and goodwill which POM
3 Wonderful has generated in its POM® trademark, Defendant Robert G. Hubbard
4 d/b/a PUR Beverages (“Defendant” or “PUR”) is engaging in deliberate trademark
5 infringement and unfair competition – conduct that threatens to confuse consumers
6 into believing that POM Wonderful has somehow endorsed, approved of, or
7 licensed Defendant’s use of POM®. Defendant has a line of energy drink beverages
8 under the PUR brand, one of which is called PUR pōm. POM Wonderful seeks an
9 order enjoining Defendant from selling and marketing this infringing product.

10 In 2001, Plaintiff POM Wonderful introduced, under its POM® trademark,
11 what is likely the most well-known pomegranate-based product marketed and sold
12 in the U.S. Since 2001, Pom Wonderful’s POM® branded pomegranate-based
13 juices and teas have shot to the top of the sales charts – it leads the nation in its
14 market segment of super-premium pomegranate juice and occupies the top spot in
15 supermarket sales in no less than eight of the nation’s major geographic markets.
16 Both the company and its products have received media accolades, and POM
17 Wonderful’s large POM® family of marks is now universally recognized by the
18 relevant consuming public. Through an innovative advertising and marketing
19 campaign, in just over ten years, POM Wonderful has built an extremely successful
20 brand in the market for pomegranate-based beverages and products.

21 Defendant’s use is intentional. POM Wonderful is not aware of any other
22 pomegranate-based beverage (other than its own products) that contain the term
23 POM® as part of its mark.¹ POM® has no meaning. It is not a word that exists in a
24 dictionary, nor is it an abbreviation for “pomegranate” or “pomegranate flavor”. To

25

26 ¹ To the extent other beverage companies have utilized POM Wonderful’s POM®
27 trademark in the past, POM Wonderful has successfully managed, either via
28 negotiation or litigation, to convince those infringers to respect its trademark rights
 and stop utilizing the trademark in conjunction with their products.

1 the extent Defendant wants to signal to consumers that its beverage is pomegranate
 2 flavored, it could simply state so on the can. In fact, Defendant does exactly that,
 3 since the container of the product states “Pomegranate all natural • no caffeine.”

4 Out of the limitless possibilities from which it could have chosen a mark,
 5 Defendant chose to use POM Wonderful’s POM® trademark. The only explanation
 6 for placing POM Wonderful’s trademark on its product is to associate its product
 7 with a highly successful brand of pomegranate-based beverages. This strongly
 8 suggests Defendant’s bad faith intent to capitalize on POM Wonderful’s goodwill.

9 Given that Defendant is using a virtually identical mark to POM Wonderful’s
 10 POM® mark in connection with a nearly identical product, POM Wonderful can
 11 easily show the elements necessary for injunctive relief.

12 First, POM Wonderful is the undisputed owner of the POM® mark, as well as
 13 a family of related marks, that consists of over 360 trademarks worldwide of which
 14 more than 70 are in the United States. Moreover, POM Wonderful easily meets the
 15 Ninth Circuit’s *Sleekcraft* test for likelihood of confusion: the marks, products,
 16 channels of trade, advertising, and target consumers are either identical or nearly
 17 identical.

18 Second, POM Wonderful can establish irreparable harm. Defendant’s use of
 19 the POM® Mark for a nearly identical product threatens to undermine the highly
 20 valuable goodwill POM Wonderful has built through the remarkable success of its
 21 products, as well as POM Wonderful’s multi-million dollar investment in its brand.

22 Furthermore, POM Wonderful’s brand and goodwill is, in part, built on the
 23 high quality, healthfulness, taste and purity of its products and POM Wonderful can
 24 exercise no quality control in connection with Defendant’s PUR pōm energy drink
 25 product. Indeed, because of the likelihood that consumers will be confused into
 26 believing that Defendant’s products are associated with, sponsored or approved by
 27 Plaintiff, should Defendant’s products have any quality issues or cause any
 28 consumers to fall ill, Plaintiff’s reputation and business could be severely damaged

1 in an instant. This is particularly true of energy drinks, which have recently been in
2 the news because their use, or misuse, have led to illnesses and even death. That is
3 precisely the type of harm the trademark laws, generally, and preliminary
4 injunctions, in particular, are designed to prevent.

5 Third, the balance of hardships tip heavily in Plaintiff's favor. The harm to
6 POM Wonderful is fourfold; (1) Defendant's use of pōm improperly connects the
7 product to POM Wonderful; (2) it causes consumers to be confused regarding
8 whether or not POM Wonderful is affiliated with or sponsored the product; (3) any
9 quality issues or ill health effects related to the consumption of PUR pōm could be
10 attributed to POM Wonderful resulting in damaged goodwill and lost sales almost
11 instantaneously; and (4) the ongoing use of pōm by an infringer decreases the
12 distinctiveness of the highly distinctive POM® brand.

13 Conversely, there is little hardship to Defendant. PUR pōm is one of four
14 different types of beverages Defendant sells. If it is forced to stop selling its
15 infringing product, it can rename the beverage with a non-infringing name and it can
16 continue to sell its other products.

17 Finally, the public interest favors the requested injunctive relief to prevent
18 consumer confusion caused by Defendant's use of the pōm mark.

19 **II. FACTUAL BACKGROUND**

20 **A. POM Wonderful**

21 The POM® brand has been used in connection with fresh fruit since 2001,
22 with beverages since 2002, and with concentrated juice extract and related products
23 since 2009.

24 For over a decade, POM Wonderful has been marketing and selling its
25 POM® brand in the United States. In that time, POM Wonderful has invested tens
26 of millions dollars in the creation, development, production, marketing and sales of
27 the POM® brand and its products. POM Wonderful's marketing and advertising
28 includes Sunday newspaper inserts, in-store promotions, print media and billboards

1 in select geographic areas, and since 2010, several television commercials. *See*
 2 Declaration of Jeremy Adams (“Adams Decl.”) ¶ 3 and Exhibit B thereto.

3 POM Wonderful, at great cost, cultivated and expanded pomegranate
 4 orchards located in California’s central valley until they became the largest
 5 commercial pomegranate orchards in North America. The POM® brand
 6 pomegranate juice has eclipsed all other products in its market segment of 100%
 7 pomegranate juices to take the top spot nationwide in supermarket sales, as well as
 8 the top spots in the key geographic regions of Los Angeles, Chicago, New York,
 9 Boston, Atlanta, Dallas, Pittsburg and Charlotte. Adams Decl. ¶ 4. As a result, the
 10 POM® brand of juice has become the bestselling brand of super-premium
 11 pomegranate juice in the United States, having sold over 190 million bottles since
 12 2002. Annual supermarket sales have gone from zero to well over \$60 million in
 13 the last 12 years. Adams Decl. ¶ 4.

14 In light of this success, POM Wonderful has expanded, and continues to
 15 expand, into new areas including selling to restaurants, specialty markets, hotels,
 16 cafeterias and convenience stores. Also, POM Wonderful’s products, including
 17 both its fresh pomegranates and its pomegranate juice, are sold to consumers not
 18 only through supermarkets, but also through large retail outlets such as Costco.
 19 Adams Decl. ¶ 5.

20 **B. The POM® Brand Intellectual Property**

21 POM Wonderful owns numerous trademark registrations and pending
 22 applications in the United States and around the world for the trademarks it uses in
 23 connection with the marketing, distribution and sale of its POM® brand products in
 24 interstate commerce. The POM® brand trademarks are used in connection with
 25 various goods including, but not limited to, fresh pomegranate fruit, arils (seeds),
 26 and pomegranate juice, and juice blends as well as products which contain fruit juice
 27 or fruit juice extracts such as tea, and dietary and nutritional supplements.

1 POM Wonderful has numerous trademarks registered with the United States
 2 Patent and Trademark Office: POM (Reg. Nos. 2637053); POM & Design (Reg. No.
 3 3047447); POM WONDERFUL (Reg. Nos. 2640835 and 3687491); POM
 4 WONDERFUL & Design (Reg. Nos. 2864641, 2780314 and 3687492); POM TEA
 5 (Reg. No. 3411595); LIGHT POM TEA (Reg. No. 3391707); LIGHT POM TEA
 6 & Design (Reg. No. 3411596); POM IN A PILL (Reg. No. 3337435); POM IN A
 7 PILL & Design (Reg. No. 3332875); POMEBERRY (Reg. No. 3382338); POM
 8 PASSION (Reg. No. 2944482); POM POWER (Reg. No. 2944481); POMx (Reg.
 9 Nos. 3562516 and 3674405); POMx & Design (Reg. No. 3562517 and 3791124);
 10 POMx SHOTS (Reg. No. 3667882); POMX SHOTS (Reg. No. 3667882);
 11 POWERED BY POMx (Reg. No. 3208934); and POMEGRANATE & Design
 12 (Reg. No. 3436526) (collectively, the “POM® Marks”). *See* Adams Decl. ¶ 2 and
 13 Exhibit A thereto for copies of the registration certificates for the POM® Marks.
 14 This family of trademarks shows the strong rights POM Wonderful has in POM®.

15 POM Wonderful’s registrations are valid and subsisting, and POM Wonderful
 16 owns all right, title and interest to the POM® Marks. Registration Nos. 2637053
 17 (POM), 2640835 (POM WONDERFUL), 2780314 , 2864641 (POM
 18 WONDERFUL & Design), and 3047447 (POM & Design) are incontestable
 19 pursuant to 15 U.S.C. Section 1065.

20 POM Wonderful, together with its affiliates, has devoted a great deal of time,
 21 money and resources to develop and extensively market its products in connection
 22 with its inherently distinctive POM® brand to establish and maintain the substantial
 23 goodwill which has come to be associated with the POM® Marks. The POM®
 24 trademark, in particular, is an extremely valuable and highly protected component of
 25 its business.

26 The POM® Marks are used consistently on every product, advertisement, and
 27 promotion in connection with POM® brand products. POM Wonderful, its
 28 distributors, and its distributor customers, both nationally and internationally, have
 {078602.3}

1 continuously and exclusively used the POM® Marks to distinguish themselves as
 2 the source of goods and services in connection therewith.

3 Defendant has no valid defense for infringing on POM Wonderful's POM®
 4 trademark. It cannot claim that it wanted to use "pom" because it is an abbreviation
 5 or short hand for pomegranate or because pomegranate is too long of a word to fit
 6 on a can. Even though pom is the first syllable of the word pomegranate, it is not an
 7 abbreviation for it. Pom has no independent meaning and is not in the dictionary,
 8 either as a word or an abbreviation. A review of other pomegranate flavored canned
 9 beverages show the use of pomegranate, not pom, to describe the content or flavor
 10 of the beverage. *See* Declaration of Michael Vasseghi ("Vasseghi Decl.") ¶ 2 and
 11 exhibit A thereto. Similar to POM Wonderful, Ocean Spray owns registered
 12 trademark rights in "cran" for non-alcoholic beverages. Vasseghi Decl. ¶ 3. Simply
 13 because "cran" is the first syllable of "cranberry" does not negate Ocean Spray's
 14 trademark rights. Finally Defendant cannot claim that it used pom in lieu of
 15 pomegranate due to space restrictions given that the full word pomegranate also
 16 appears on the can.

17 **C. POM Wonderful's Extensive Marketing And Promotion Of The**
POM® Brand

18 POM Wonderful has invested substantially in the POM® brand, spending
 19 tens of millions of dollars in the U.S. in the marketing, advertising, sales and
 20 promotion of the POM® brand products. POM Wonderful has pursued direct
 21 marketing efforts to grocery, gourmet food, health food, and other specialty stores,
 22 restaurants, health clubs, and health professionals throughout the world.
 23

24 POM Wonderful's philosophy is to support worthwhile local community
 25 efforts. POM Wonderful does so as part of an overall goal to promote and
 26 contribute to the health of consumers, including the sale of its own products. Adams
 27 Decl. ¶ 6.
 28

///

1 POM Wonderful has also sponsored many high profile charity and healthy
 2 life-style related events such as the LA Marathon; Nike Women's Marathon; DC
 3 Triathlon; the NYC Triathlon; Cart for a Cause (benefiting Meals on Wheels); Best
 4 Buddies Challenge (benefiting Best Buddies); GLAAD Media Awards (benefiting
 5 Gay and Lesbian Alliance Against Defamation); and the New York City Wine and
 6 Food Festival (benefiting Share Our Strength). Adams Decl. ¶ 7 and Exhibit C
 7 thereto show photographs which illustrate some of POM Wonderful's charitable
 8 efforts.

9 In the fall of 2010, POM began its first television advertisement campaign for
 10 the POM® brand. POM Wonderful's television commercials have aired in the
 11 United States, Canada, France, the United Kingdom and the Netherlands thus far.
 12 Adams Decl. ¶ 8 and Exhibit D thereto. In 2011 and 2012 alone, POM Wonderful
 13 spent over \$24 million on marketing, promotions, displays, point of sale material,
 14 advertising production, web media and trade shows for its POM® brand of juices in
 15 North America. Adams Decl. ¶ 15.

16 In the United States, POM Wonderful's television commercials were featured
 17 on such popular networks as ABC, NBC, CBS, CNN, MSNBC, E!, Bravo, A&E,
 18 Discovery Channel, Comedy Central, Food Network, FX, National Geographic,
 19 Style, and many others. Adams Decl. ¶ 9. POM Wonderful's television
 20 commercials aired during such highly popular shows as CSI Miami, Criminal
 21 Minds, Grey's Anatomy, Top Chef, Real Housewives, Survivor, the Amazing Race,
 22 Larry King, Anderson Cooper 360, The Daily Show, The Stephen Colbert Report,
 23 Myth Busters, Chelsea Lately, E! News, Barefoot Contessa, Modern Marvels, MS
 24 Morning Joe, Biggest Loser, 30 Rock, and many others. Adams Decl. ¶ 10.

25 POM Wonderful has also received industry accolades, including substantial
 26 unpaid publicity and media recognition. For example, within a few years after its
 27 launch, in 2005 Plaintiff received the coveted Company of the Year Award at The
 28 Beverage Forum, the industry's leading trade show. Adams Decl. ¶ 11. In addition,

1 in its 2005 annual “America’s 100 Best” awards, Reader’s Digest named Plaintiff’s
 2 POM® branded pomegranate juice as the nation’s “best healthy beverage.” Adams
 3 Decl. ¶ 12 . Further, POM Wonderful’s distinctive POM® pomegranate juice
 4 bottle, along with its famous POM® mark, have frequently appeared on television
 5 newscasts, cooking/lifestyle shows (including “Martha Stewart” and “Oprah”), and
 6 entertainment programs (most recently the hit show “Desperate Housewives”).
 7 Adams Decl. ¶ 13.

8 In short, POM Wonderful’s POM® family of marks, which appear in all of its
 9 advertising, as well as on all of its products, store displays, point of sale material and
 10 its website, have become extremely well known, representing a high quality and
 11 well-known brand.

12 **D. POM Wonderful’s Trademark Registrations And Enforcement
 13 Activities**

14 POM Wonderful owns the trademark POM® in connection with its products.
 15 Indeed, prior to POM Wonderful’s adoption and use of POM®, no one in the food
 16 or beverage industry was known to be using POM in any way.

17 POM Wonderful actively polices third-party uses that it believes infringe its
 18 rights in the POM® Marks. For example, POM Wonderful regularly sends out
 19 cease and desist letters to third-parties who use POM® and has, on multiple
 20 occasions, required third-parties to modify their names and/or marks so as to avoid
 21 infringing POM Wonderful’s rights. In one instance, a third party was
 22 manufacturing and marketing an energy drink beverage called “BLU POM” which
 23 was sold under the name “Xenergy.” After being advised of POM Wonderful’s
 24 rights, this third-party agreed to change its product name to eliminate the use of
 25 POM. Vasseghi Decl. ¶ 4.

26 Similarly, a well-known company famous for its ice cream introduced a
 27 smoothie called “Super Pom.” This entity agreed to change its product name upon
 28 receiving a cease and desist letter from POM Wonderful. These changes by third-

1 parties show that POM Wonderful's competitors recognize its rights in the POM®
 2 Marks. Vasseghi Decl. ¶ 5.

3 **E. Defendant's Infringing Conduct**

4 Defendant PUR produces, markets and sells several lines of energy drinks
 5 under the PUR brand – namely PUR pōm, PUR renew, PUR revolution, and PUR
 6 rāz. Once POM Wonderful learned that Defendant was selling PUR pōm, it sent a
 7 “cease and desist” letter to Defendant via email informing Defendant about POM
 8 Wonderful’s rights. Vasseghi Decl. ¶ 7. Within fifteen minutes Defendant’s owner,
 9 Mr. Robert Hubbard, responded that Defendant would not change the packaging for
 10 the beverage. *Id.* Defendant has not changed its position even after being served
 11 with the Complaint in the instant action. *Id.*

12 **III. POM IS ENTITLED TO INJUNCTIVE RELIEF**

13 **A. Standards For Injunctive Relief**

14 The decision to grant a preliminary injunction rests within the sound
 15 discretion of the trial court. *See Stanley v. University of Southern California*, 13
 16 F.3d 1313, 1319 (9th Cir. 1994). Injunctive relief is the remedy of choice for
 17 trademark cases. *Century 21 Real Estate Corp. v. Sandlin*, 846 F.2d 1175, 1180 (9th
 18 Cir. 1988) (“Injunctive relief is the remedy of choice for trademark ... cases, since
 19 there is no adequate remedy at law for the injury caused by a defendant’s continuing
 20 infringement”). Moreover, the Lanham Act specifically provides for injunctive
 21 relief to prevent violations of trademark rights in Section 1125(a). 15 U.S.C. §
 22 1116(a) (the court has the “power to grant injunctions according to principles of
 23 equity and upon such terms as the court may deem reasonable, to prevent the
 24 violation of any right” of the trademark owner.)

25 “A plaintiff seeking a preliminary injunction must establish that he is likely to
 26 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
 27 preliminary relief, that the balance of hardships tips in his favor, and that an
 28 injunction is in the public interest.” *Boldface Licensing + Branding v. By Lee Tillett*,

1 *Inc.*, 2013 WL 1685464, *5 (C.D. Cal. 2013) citing *Winter v. Natural Res. Defense*
 2 *Council, Inc.*, 555 U.S. 7, 20 (2008); *Marlyn Nutraceuticals, Inc. v. Mucos Pharma*
 3 *GmbH & Co.*, 571 F.3d 873, 877 (9th Cir. 2009). “This recitation of the
 4 requirements for a preliminary injunction did not completely erase the Ninth
 5 Circuit’s ‘sliding scale’ approach, which provided that the elements of the
 6 preliminary injunction test are balanced, so that a stronger showing of one element
 7 may offset a weaker showing of another.” *Boldface Licensing + Branding* at *5;
 8 citing *Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 739 (9th Cir.
 9 2011). As discussed more fully herein, injunctive relief is warranted in this case.

10 **IV. POM WONDERFUL HAS A HIGH LIKELIHOOD OF SUCCESS ON THE MERITS**

11 **A. Trademark Infringement Legal Standard**

12 POM Wonderful is highly likely to succeed on the merits of its infringement
 13 claim. To prevail on a claim of trademark infringement, POM Wonderful must
 14 prove (a) its owns protectable trademarks, and that (b) the alleged infringer’s
 15 imitating mark is similar enough to cause a likelihood of confusion, or to cause
 16 mistake, or deceive consumers. *KP Permanent Make-Up, Inc. v. Lasting*
 17 *Impression, Inc.*, 543 U.S. 111, 117 (2004). A finding of likelihood of confusion
 18 will also support POM’s claims of common law unfair competition and unfair
 19 competition pursuant to California Business & Professions Code Section 17200.
 20 See *Walter v. Jeremyel, Inc.*, 210 F.3d 1108, 1111 (9th Cir. 2000) (“the test for false
 21 designation under the Lanham Act, as well as the common law and statutory unfair
 22 competition claims, is whether there was a ‘likelihood of confusion.’”); *Cleary v.*
 23 *News Corp.*, 30 F.3d 1255, 1262-1263 (9th Cir. 1994) (“This Circuit has consistently
 24 held that state common law claims of unfair competition and actions pursuant to
 25 California Business & Professions Code § 17200 are ‘substantially congruent’ to
 26 claims made under the Lanham Act.”).

27 ///

1 **B. POM Wonderful Owns Valid Trademarks**

2 As outlined in detail above, POM Wonderful owns many valid and
 3 protectable trademarks, evidenced by their certificates of registration. Adams Decl.
 4 ¶ 2 and Exhibit A thereto. A certificate of registration constitutes “prima facie
 5 evidence of the validity of the trademark and of the facts stated in the certificate.”
 6 15 U.S.C. § 1057(b).

7 Several of POM Wonderful’s registered trademarks – Reg. Nos. 2637053,
 8 3047447, 2640835, 2864641 and 2780314 – are incontestable pursuant to 15 U.S.C.
 9 Section 1065. Incontestable marks are those which have been registered with the
 10 United States Patent and Trademark Office for more than five years. The effect of
 11 incontestability is set forth in Section 33(b) of the Lanham Act:

12 [The incontestable] registration shall be conclusive evidence of the validity of
 13 the registered mark and of the registration of the mark, of the registrant’s
 14 ownership of the mark, and of the registrant’s exclusive right to use the
 15 registered mark in commerce ... on or in connection with the goods or
 16 services specified in the affidavit filed under the provisions of section
 17 1065....

18 15 U.S.C. § 1115(b).

19 Since POM Wonderful’s registered trademarks are presumed valid.

20 **C. PUR pōm Is Likely to Cause Confusion With POM Wonderful’s
 21 POM® Trademark**

22 The Ninth Circuit has promulgated a multi-factor test to determine a
 23 plaintiff’s probability of success on the likelihood of confusion question and, in turn,
 24 whether a preliminary injunction is warranted. *AMF, Inc. v. Sleekcraft Boats*, 599
 25 F.2d 341, 348-49 (9th Cir. 1979); *see also Rearden LLC v. Rearden Commerce, Inc.*,
 26 683 F.3d 1190, 1209 (9th Cir. 2012). The following “polar

27 factors” guide the determination of whether there is a likelihood of
 28 confusion: (1) strength of POM Wonderful’s marks at issue; (2) similarity of the
 marks; (3) proximity or relatedness of the products or services; (4) defendant’s
 intent on selecting its mark; (5) evidence of actual confusion; (6) marketing

1 channels used; (7) likelihood of expansion into other markets; and (8) the degree of
 2 care likely to be exercised by purchasers. *Sleekcraft*, 599 F.2d at 348-49. The two
 3 most important *Sleekcraft* factors are similarity of the marks and relatedness of the
 4 goods. *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000).
 5 POM Wonderful easily satisfies not only those two factors, but most of the other
 6 factors as well.

7 **1. Similarity Of The Marks – Heavily Favors POM Wonderful**

8 In evaluating the similarity of the marks, “first, the marks must be considered
 9 in their entirety and as they appear in the marketplace; second, similarity is adjudged
 10 in terms of appearance, sound, and meaning; and third, similarities are weighed
 11 more heavily than differences.” *GoTo.com, Inc.* at 1206. “The more similar the
 12 marks in terms of appearance, the greater the likelihood of confusion. *K-Swiss, Inc.*
 13 v. USA Aisiqi Shoes, Inc., 291 F. Supp.2d 1116, 1123 (C.D. Cal. 2003). Further, if
 14 the marks are used “with identical products or services, likelihood of confusion
 15 would follow as a matter of course. *Brookfield Communications, Inc. v. West Coast*
 16 *Entm’t, Inc.*, 174 F.3d 1036, 1056 (9th Cir. 1999). “The first *Sleekcraft* factor – the
 17 similarity of the marks – has always been considered a critical question in the
 18 likelihood-of-confusion analysis.” *Id.* at 1054.

19 Here, Defendant has literally copied POM Wonderful’s POM® trademark.
 20 The only difference is that Defendant does not write “POM” in capitalized letters,
 21 and there is a breve² above the “o”, such that it is written as “pōm.” Vasseghi Decl.
 22 ¶ 6 Given that “POM” and “pōm” are virtually identical, in sight, sound and
 23 meaning, the “similarity of the marks” factor strongly supports a likelihood of
 24 confusion.

25 / / /

26 ² The half circle that appears above the “o” is called a breve. It is the diacritical
 27 mark that when placed over a vowel, shortens its sound, as in the “a” in the word
 28 bat.

1 **2. Strength Of The Trademarks At Issue – Heavily Favors**
 2 **POM® Wonderful**

3 A strong mark is one that is likely to make a consumer think a product or
 4 service comes from a particular source. *See Official Airline Guides v. Goss*, 6 F.3d
 5 1385, 1392 (9th Cir. 1993) (“the stronger a mark, the more likely it is that consumers
 6 will think that a product or service comes from a particular source”). The “strength
 7 of a trademark is evaluated in terms of its conceptual strength and commercial
 8 strength.” *GoTo.com, Inc.* at 1207. To determine conceptual strength, marks are
 9 placed within one of several categories which are referred to, in increasing order of
 10 distinctiveness, as generic, descriptive, suggestive, arbitrary, or fanciful. *See*,
 11 *Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1047 (9th Cir.
 12 1998). The more distinctive on the scale, the stronger the mark.

13 To determine whether a term has become generic, courts look to “whether
 14 consumers understand the word to refer only to a particular producer’s goods or
 15 whether the consumer understands the word to refer to the goods themselves.” *KP*
 16 *Permanent Make-Up, Inc.* at 604. POM® cannot refer to any good since it has no
 17 meaning, thus it is not generic for this reason alone. Furthermore, it is a registered
 18 trademark, which provides a “specific presumption” that it is not generic. *Id.*

19 Nor is POM® descriptive. The POM® word mark (Reg. No. 2637053) was
 20 registered more than five years ago and has been used continuously in commerce for
 21 over a decade, making it incontestable. “[A] defendant in a trademark infringement
 22 action cannot assert that an incontestable mark is invalid because it is descriptive
 23 and lacks secondary meaning.” *KP Permanent Make-Up, Inc. v. Lasting Impression*
 24 *I, Inc.*, 408 F.3d 596, 606 (9th Cir. 2005) citing *Park ‘N Fly, Inc. v. Dollar Park &*
 25 *Fly, Inc.*, 469 U.S. 189, 205 (1985).

26 POM® may be considered to be suggestive, but regardless of its exact
 27 categorization, it is further bolstered by its commercial strength, as well as its length
 28 of exclusive use, public recognition and uniqueness. *See Accuride Int’l, Inc. v.*

1 *Accuride Corp.*, 871 F.2d 1531, 1536 (9th Cir. 1989); *see also Brookfield, supra* at
 2 1058 (“[t]he stronger a mark – meaning the more likely it is to be remembered and
 3 associated in the public mind with the mark’s owner – the greater the protection it is
 4 afforded by the trademark laws”).

5 The “commercial strength” of the POM® Marks is very high. For over a
 6 decade, POM Wonderful has been marketing and selling its POM® brand in the
 7 United States. Adams Decl. ¶ 3. Just in 2011 and 2012, POM spent over \$24
 8 million marketing and promoting the POM® pomegranate juice brand in North
 9 America alone. *Id.* This amount was spent on items such as marketing, promotions,
 10 displays, point of sale material, advertising production, web media and trade shows.
 11 *Id.*

12 Moreover, over 190 million bottles of POM® pomegranate juice have been
 13 sold since 2002. Adams Decl. ¶ 4. These substantial investment in sales and
 14 advertising have created exceptionally strong marks. The “POM” trademark on its
 15 beverages is recognized as an indicator of POM Wonderful’s high-quality products
 16 world-wide. Finally, POM Wonderful’s use of POM® is exclusive. To the extent
 17 any other entity has wrongly used any of its trademarks, POM Wonderful has taken
 18 steps to stop such use. Vasseghi Decl. ¶ 4.

19 In light of the strength of the POM® trademarks, the fourth factor strongly
 20 supports a finding of likelihood of confusion.

21 **3. Evidence Of Actual Confusion - Neutral**

22 While instances of actual confusion are still being investigated, courts have
 23 consistently held, particularly in the context of preliminary injunction motions, that
 24 evidence of actual confusion is not necessary for a finding of likelihood of
 25 confusion. “It is black letter law that actual confusion need not be shown to prevail
 26 under the Lanham Act since actual confusion is very difficult to prove and the act
 27 requires only a likelihood of confusion as to source.” *Lois Sportswear, U.S.A., Inc.*
 28 v. *Levi Strauss & Co.*, 799 F.2d 867, 875 (2nd Cir. 1986); *see also GoTo.com, Inc. v.*
 {078602.3}

1 *Walt Disney Co.*, 202 F.3d 1199, 1206 (9th Cir. 2000); *Sleekcraft*, 599 F.2d at 353.
 2 When, as in this case, the marks in question are virtually identical, or at least
 3 extremely similar, and there is a reasonable likelihood that consumers will assume
 4 that a mark is associated with another source because of that similarity, a likelihood
 5 of confusion will be found. *See, e.g. Academy of Motion Picture Arts v. Creative*
 6 *House*, 944 F.2d 1446, 1456 (9th Cir. 1991).

7 Due to the high degree of similarity between pōm and POM®, and given that
 8 these marks are both used on beverages, this factor clearly and strongly supports a
 9 finding of likelihood of confusion.

10 **4. Defendant's Intent – Favors POM Wonderful**

11 Intent is not a requirement for infringement. *E. & J. Gallo Winery v. Gallo*
 12 *Cattle Co.*, 955 F.2d 1327, 1341, modified on other grounds, 967 F.2d 1280 (9th
 13 Cir. 1992) (“[a] party claiming trademark infringement need not demonstrate that
 14 the alleged infringer intended to deceive consumers.”). POM Wonderful sent a
 15 cease and desist letter to PUR advising it that its use of “pōm” infringed upon POM
 16 Wonderful’s rights. Vasseghi Decl. ¶ 7. That same day, Mr. Robert Hubbard, Jr.,
 17 the owner of Defendant, responded that he “will not be changing a thing on my
 18 packaging, etc.” *Id.* Apparently, Defendant did not even bother to consult with an
 19 attorney considering that he responded to the cease and desist letter within *fifteen*
 20 *minutes*, summarily dismissing POM Wonderful’s rights and concerns about
 21 consumer confusion.

22 Defendant’s cavalier attitude toward violating POM Wonderful’s intellectual
 23 property rights is not an isolated incident, as Defendant has engaged in other acts of
 24 infringement as well. “PUR” is actually a registered trademark of Pur Water
 25 Purification Products, which filed suit against Defendant for trademark infringement
 26 in Ohio earlier this year. Vasseghi Decl. ¶ 8 and Exhibit B thereto.

27 Additionally, given the similarity between the two trademarks, “when an
 28 alleged infringer knowingly adopts a mark similar to another’s, courts will presume

1 an intent to deceive the public.” *Official Airline Guides v. Goss*, 6 F.3d 1385, 1394
 2 (9th Cir. 1993); *Glow Indus., Inc. v. Lopez*, 252 F.Supp.2d 962, 1002 (C.D. Cal.
 3 2002). See also *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149,
 4 158 (9th Cir. 1962) (defendant’s adoption of similar marks indicates it expects
 5 confusion and resulting profit). Even though PUR’s intent cannot be established via
 6 direct evidence, the Court may presume an intent to deceive on the part of
 7 Defendant given its blatant copying of POM Wonderful’s trademark. *Official
 8 Airline Guides* at 1002.

9 Whether presumed from PUR’s blatant copying or PUR’s refusal to alter the
 10 name of its product descriptor after it learned that it was infringing on POM
 11 Wonderful’s trademark, this factor strongly supports a finding of likelihood of
 12 confusion.

13 **5. Relatedness Of The Products – Heavily Favors POM
 14 Wonderful**

15 There is a greater likelihood of confusion when the goods themselves are very
 16 similar. “[L]ess similarity between the marks will suffice when the goods are
 17 complementary, [and] the products are sold to the same class of purchasers, ... or the
 18 goods are similar in use and function.” *Sleekcraft*, 599 F.2d at 350 (citations
 19 omitted).

20 Relatedness of a product is construed broadly for purposes of a trademark
 21 infringement analysis. For instance, in *Polar Corp. v. PepsiCo, Inc.*, 789 F. Supp.
 22 2d 219, 233 (D. Mass. 2011) defendant argued that its sodas were not “related” to
 23 plaintiff’s slush drink product because (1) unlike plaintiff’s product, its product was
 24 dispensed from stand-alone machines, and not sold in bottles; (2) plaintiff’s products
 25 were slush drinks that were brightly-colored frozen beverages intended for
 26 immediate consumption, which were distinguishable in overall look and feel from
 27 other beverages; and (3) slush drinks are typically consumed in the afternoon as a
 28 snack, but carbonated soda beverages are typically consumed with a meal. *Id.*

1 Notwithstanding these differences the Court found the beverages to be related for
 2 purposes of this relatedness factor and issued a preliminary injunction. The Court
 3 reasoned:

4 Although slush beverages are “distinguishable in overall look and feel” from
 5 sodas and flavored water, that fact alone is not dispositive. *The question is*
 6 *not whether consumers would confuse a slush drink with a soda, but*
whether they would reasonably conclude that a soda manufacturer and
distributor would also produce slush drinks.

7
 8 *Polar Corp.* at 232 (emphasis added).

9 Here, Defendant’s and POM Wonderful’s products are clearly related: both
 10 are beverages. Both are pomegranate based or pomegranate flavored. Both are sold
 11 in single serve containers. Both products are sold in the refrigerated section of
 12 supermarkets. Vasseghi Decl. ¶ 9 and Exhibit C thereto.

13 While consumers know the difference between an energy drink and a juice or
 14 flavored tea, as in *Polar Corp.*, the issue here is not whether consumers can
 15 distinguish the difference between the two products but whether they believe that
 16 POM Wonderful would also manufacture a pomegranate flavored energy drink.

17 Such a conclusion does not require much imagination. In addition to the
 18 overlapping trademark on these products, it is not uncommon for beverage
 19 companies to sell both juice and energy drinks. For example, Hansen’s, the maker
 20 of “Monster” energy drinks, started out as a fruit juice company and still sells fruit
 21 juices, including pomegranate juice. Vasseghi Decl. ¶ 10. Similarly, the Dr. Pepper
 22 Snapple Group that originally started out selling the “Snapple” line of teas and fruit
 23 juices now also sells an energy drink called Venom Energy. *Id.*

24 Even though POM Wonderful and PUR’s beverages are not identical in that
 25 one is carbonated and comes in a can while POM Wonderful’s products do not, they
 26 are undoubtedly “related” for purposes of a likelihood of confusion analysis.

27 ///

28 ///

{078602.3}

1 **6. The Marketing And Trade Channels For The Goods –
2 Heavily Favors POM Wonderful**

3 The Ninth Circuit has held that “[c]onvergent marketing channels increase the
4 likelihood of confusion. Therefore, the courts examine the proximity of the
5 marketing channels to one another and whether direct competition exists.”

6 *Nutri/System, Inc. v. Con-Stan Indus., Inc.*, 809 F.2d 601, 606 (9th Cir. 1987). Both
7 POM Wonderful and Defendant sell single-serve beverages which sell in
8 overlapping trade channels such as supermarkets and convenience stores. Adams
9 Decl. ¶ 16. Trade channels in this case are not just convergent, but identical in some
10 instances. By way of example both POM Wonderful’s products and Defendant’s
11 product are sold in Albertson’s. *Id.* Also, POM Wonderful markets its POM®
12 products through the internet, as does Defendant. *Id.* The overlap of trade channels
13 and the similarity in marketing of these competing products strongly supports a
14 finding of likelihood of confusion.

15 **7. Type Of Good And the Degree Of Care Likely Exercised By
16 Consumers – Heavily Favors POM Wonderful**

17 Beverages are considered a “fast moving consumer good” available to a large
18 portion of the population, purchased by consumers frequently and with wide
19 distribution and relatively low cost. Adams Decl. ¶ 17. A PUR beverage costs
20 approximately \$2.49. Vasseghi Decl., ¶ 11. POM Wonderful’s 8 oz. POM®
21 pomegranate juice product typically costs \$1.99. Adams Decl. ¶ 17. As such,
22 “consumers of such are likely to pay little care and attention when purchasing these
23 products and therefore are inclined to be less sophisticated buyers.” *Tri-Star*
24 *Pictures, Inc. v. Unger*, 14 F.Supp.2d 339, 358 (S.D.N.Y. 1998); *CSC Brands LP v.*
25 *Herdez Corp.*, 191 F.Supp.2d 1145, 1153 (E.D. Cal. 2001) (“Given that these
26 beverages are sold in supermarkets and are low cost, the degree of care likely to be
27 exercised by purchasers is minimal. [W]hen dealing with inexpensive products,
28 customers are likely to exercise less care, thus making confusion more likely.””
quoting *Brookfield*, 174 F.3d at 1060. Given the low degree of care exercised by

1 consumers in purchasing a relatively inexpensive single-serve beverage, this factor
 2 strongly supports a finding of likelihood of confusion.

3 **8. Likelihood Of Expansion - Neutral**

4 The “likelihood of expansion” factor requires a consideration of “whether
 5 existence of the allegedly infringing mark is hindering the plaintiff’s expansion
 6 plans.” *Surfivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 634 (9th Cir. 2005).
 7 The likelihood of expansion factor “is relatively unimportant where the two
 8 companies already compete to a significant degree.” *Brookfield*, 174 F.3d at 1055.

9 As previously shown, POM Wonderful and Defendant are competitors in the
 10 beverage product market. Both products are sold in the same trade channels.
 11 Therefore, expansion is similar for both parties making this factor relatively
 12 unimportant in the likelihood of confusion analysis.

13 **V. POM WONDERFUL WILL LIKELY SUFFER IRREPARABLE
 HARM IF AN INJUNCTION IS NOT ISSUED**

14 POM Wonderful has shown it is highly likely to succeed on the merits and
 15 will also likely suffer irreparable injury for which there is no adequate remedy at
 16 law if an injunction is not granted. Specifically, the irreparable harm to POM
 17 Wonderful is (1) Defendant’s use of pōm improperly connects the product to POM
 18 Wonderful; (2) Defendant’s use causes consumers to be confused regarding whether
 19 or not POM Wonderful is affiliated with or sponsors the product; (3) POM
 20 Wonderful has no control over the manufacturing or quality control of the PUR pōm
 21 beverage – therefore, any quality or health issues related to Defendant’s energy drink
 22 beverage – a highly caffeinated, sugar laden-product – could be attributed to POM
 23 Wonderful, resulting in damaged goodwill and lost sales; and (4) the ongoing use of
 24 pōm by an infringer decreases the distinctiveness of the highly distinctive POM®
 25 brand.

26 Unfair competition damages are normally not susceptible to adequate
 27 measurement because it is virtually impossible to ascertain the precise economic
 28

1 consequences of intangible harm, such as damage to goodwill, reputation and
 2 business. *See Pepsico Inc. v. Reyes*, 70 F.Supp.2d 1057, 1060 (C.D. Cal. 1999).

3 **A. Serious Questions On The Merits And The Balance Of Hardships
 Tips Sharply In POM Wonderful's Favor.**

4 **1. Serious Questions On The Merits.**

5 Having established a likelihood that POM Wonderful will prevail on the
 6 merits, this case presents a “serious question” on the merits, which only requires that
 7 the moving party have “a fair chance of success on the merits.” *Sierra On-Line, Inc.*
 8 *v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984). POM Wonderful
 9 contends that the established “serious question” standard, combined with the
 10 balance of hardships, amply supports issuing immediate injunctive relief.

11 **2. The Balance Of Hardships Tips Sharply In Favor Of POM
 Wonderful.**

13 If the Court determines that there is a serious question on the merits, the
 14 balance of hardships then becomes the critical element in the analysis. *Sierra On-*
 15 *Line*, 739 F.2d at 1421. The balance of hardships tips heavily in POM Wonderful’s
 16 favor. As this District has recognized, damages caused by trademark infringement
 17 are, “by their very nature irreparable and not susceptible to adequate measurement
 18 for remedy at law.” *C & C Organization v. AGDS Inc.*, 676 F. Supp. 204, 208 (C.D.
 19 Cal. 1987). Here, POM Wonderful is at risk of losing all of its meaningful
 20 trademark protection, the lifeblood of the POM® brand. If POM Wonderful can no
 21 longer control the use of its brand, and thereby its reputation for quality, then the
 22 millions of dollars spent over the last decade on advertising, sponsorships,
 23 maintenance of the highest quality standards, and the generation of substantial
 24 goodwill will have been virtually obliterated, or at least severely compromised.
 25 This risk is further magnified by the fact that PUR pōm is an energy drink. This
 26 year the FDA has investigated several energy drink manufacturers after consumers
 27 reported falling ill from consuming energy drinks. One instance resulted in a
 28 fatality. Vasseghi Decl. ¶ 13.

1 On the other hand, Defendant does not face any risk of undue harm.
 2 Defendants PUR pōm product was introduced only a short time ago and has not yet
 3 achieved any meaningful market presence in the United States. At most, an
 4 injunction would result in a delay in the marketing and promotion of a beverage, a
 5 loss which could be adequately covered by an appropriate bond. Furthermore, PUR
 6 pōm is one of four kinds of beverages Defendant sells. If it is enjoined from selling
 7 PUR pōm, this will not cause it to shut down – it can continue to do business, selling
 8 its other flavors and rename its PUR pōm product.

9 **3. Injunction Is In The Public Interest**

10 A plaintiff seeking an injunction must establish that the injunction is in the
 11 public interest. *Winter, supra* at 381–82. This factor is easily met in trademark
 12 infringement cases since “[t]he public interest in preventing trademark infringement
 13 is avoiding confusion in the market place.” *Seed Services, Inc. v. Winsor Grain,*
 14 *Inc.*, 868 F.Supp.2d 998, 1005 (E.D. Cal. 2012). The consuming public deserves to
 15 not be fooled into thinking that POM Wonderful’s product is in the PUR pōm
 16 product, and that POM Wonderful is associated with or sponsors the product in any
 17 way.

18 **VI. CONCLUSION**

19 For the foregoing reasons, POM Wonderful respectfully requests that the
 20 Court issue a preliminary injunction against PUR Beverages precluding it from
 21 selling or advertising its PUR pōm product as outlined in the concurrently filed
 22 proposed Order.

23

24 DATED: November 22, 2013 ROLL LAW GROUP PC

25

26

By: /s/ Michael M. Vasseghi /s/

27

Michael M. Vasseghi

28

Attorneys for POM WONDERFUL LLC